33675 SERVICE DATE – JUNE 27, 2003
CO

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 41191

WEST TEXAS UTILITIES COMPANY
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: June 26, 2003

West Texas Utilities Company (WTU)[1] seeks a stay of the effective date of the Board's decision in this proceeding served May 29, 2003 (West Texas III). In that decision, the Board reopened the proceeding for the narrow purpose of correcting a material error in a prior decision and issued a revised rate prescription based on the evidence previously introduced in the proceeding. The revised prescription is currently scheduled to take effect on June 28, 2003. WTU contends that the Board should stay the West Texas III decision pending Board action on its petition for reconsideration and/or Board action on a not-yet-filed petition for a broader reopening to consider new evidence or changed circumstances. For the reasons discussed below, WTU's request for a stay is denied.

BACKGROUND

Prior Decisions

In 1994, WTU challenged the reasonableness of the rate charged for the transportation of coal in unit-trains from the Rawhide mine in the Powder River Basin to WTU's Oklaunion generating station in Vernon, TX. In the original proceeding, the stand-alone cost (SAC) test[2] showed that the defendant,

---

[1] AEP Texas North Company is the successor in interest to WTU, the original complainant in this proceeding. For convenience, both the original complainant and its successor are herein referred to as WTU.

[2] See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

The Burlington Northern and Santa Fe Railway Company (BNSF),[3] was collecting unreasonable rates on this traffic.[4] The Board therefore ordered BNSF to pay reparations and prescribed the maximum reasonable rate for traffic that originated at the Rawhide mine. Because the maximum reasonable rate under the SAC test initially fell below the jurisdictional threshold for regulatory action – 180% of the variable cost for the challenged movement – the Board prescribed future rates at the jurisdictional threshold.

On April 17, 2003, BNSF filed a petition asserting that the Board's failure to set the prescribed rate at the *higher* of the maximum reasonable rate as determined by the SAC test or the jurisdictional threshold was material error. BNSF asserted that the SAC rate for the present and possibly future years under those original SAC calculations may now exceed the jurisdictional threshold. BNSF therefore sought a revised prescription and an order requiring WTU to reimburse BNSF for the difference between the SAC rate and the prescribed rate for shipments that had moved since the beginning of 2002.

WTU objected to BNSF's request to revise the prescription. WTU did not contest the general proposition that a railroad has the right to charge the higher of the SAC rate or the jurisdictional threshold. Rather, WTU argued that the Board had to conduct a full evidentiary hearing on the appropriate SAC rate before it could correct the material error in West Texas I. WTU stated that, if afforded the opportunity, it would show that the projections upon which the SAC analysis was based — projections regarding coal volumes, revenues, inflation forecasts, capital costs, and other factors — are now inaccurate and outdated as compared to actual or current data. WTU also argued that it should be allowed to change certain of the basic assumptions upon which the SAC analysis was predicated, such as the traffic group it originally selected.

In West Texas III, the Board reopened the proceeding for the limited purpose of correcting the identified material error, and revised the rate prescription prospectively. The Board stated that WTU could file a petition seeking a broader reopening to consider new evidence or changed circumstances, but that Board found that it was "not necessary or appropriate to withhold immediate correction of an

---

[3] The original defendant in this proceeding, Burlington Northern Railroad Company, has since merged with The Atchison, Topeka and Santa Fe Railway Company to form BNSF. For convenience, both the original defendant and its predecessor are herein referred to as BNSF.

[4] West Texas Util. Co. v. Burlington N. R.R. Co., 1 S.T.B. 638, 667 (1996) (West Texas I), aff'd sub nom. Burlington N. R.R. Co. v. STB, 114 F.3d 206 (D.C. Cir. 1997).

obvious mistake" pending such an undertaking. West Texas III, at 4. The Board also rejected BNSF's request to apply retroactively the corrected Rawhide rate prescription. As noted above, the revised prescription is scheduled to become effective on June 28, 2003.

Stay Request

On June 9, 2003, WTU filed a petition for a stay of the West Texas III decision pending Board action on the petition for reconsideration that it has since filed and/or a forthcoming petition to reopen the proceeding. WTU argues that the Board may not alter a rate prescription absent a full consideration of all of the changed circumstances that might influence the SAC rate. It also contends that the West Texas III decision is an improper post-hoc application of policy developed in rate cases decided after the Board issued West Texas I. Finally, WTU argues that correction of a material error must generally occur within 1 year of the original decision.

WTU also contends that it faces immediate and irreparable harm if the revised prescription takes effect as scheduled. WTU's view is that the Board would be powerless to order BNSF to return any overcharges paid if, following a broader reopening, the revised prescription is ultimately determined to be unreasonably high. Recognizing that a stay may cause BNSF irreparable harm, WTU asks the Board to adopt an approach akin to that set forth in Arizona Public Service Co. v. Burlington Northern & Santa Fe Railway Co., STB Docket No. 41185 (STB served May 12, 2003) (Arizona PSC), where the Board lifted the prescriptive effect of a rate order and directed each party to keep account of the amounts paid, after determining that it was appropriate to reopen the preceding, so that the other could be made whole if it prevailed at the conclusion of the proceeding.

On June 16, 2003, BNSF replied in opposition to WTU's request for a stay. BNSF argues, *inter alia*, that WTU's petition is fundamentally misconceived because it jumbles together reconsideration and reopening, treating the possibility of a subsequent favorable decision on reopening as having the same legal significance as the possibility of a favorable decision on reconsideration. BNSF argues that the Board should deny a stay pending reconsideration because there is little likelihood that WTU will succeed in overturning the West Texas III decision. BNSF also argues that a stay of the West Texas III decision pending a broader reopening is inappropriate, as a decision on a broader reopening would be completely unrelated to the basis for the action taken in West Texas III. BNSF characterizes the stay request as an attempt to obtain retroactive relief that WTU could not obtain by merely filing a request to reopen: "WTU should not be permitted to obtain retroactive

revocation of a rate prescription by obtaining a stay of a decision that is unrelated to the merits of a possible new rate reasonableness determination on reopening."[5]

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits of a request for reconsideration; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. See Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958); C&C R.R., Inc. – Operation Exemption – Centerpoint Properties, L.L.C., Finance Docket No. 33990, slip op. at 1 (STB served Jan. 8, 2001).

WTU's filing commingles a request for a stay pending reconsideration with a request for a stay pending reopening. However, WTU's bases for reconsideration and for a broader reopening are different, as would be the legal significance of a favorable decision on each. Therefore, the two requests will be analyzed separately.

Stay Pending Reconsideration

A stay pending reconsideration of West Texas III is not necessary because, if WTU should prevail in its petition for reconsideration in persuading the Board that the West Texas III decision was unlawful, the agency can undo that decision on reconsideration. WTU contends, however, that it would suffer irreparable harm because, under Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co., 284 U.S. 370 (1932) (Arizona Grocery), once the revised prescription takes effect, the Board cannot award reparations with respect to shipments that move under that prescribed rate.

The agency, however, has the authority to reinstate the original rate prescription retroactively when acting upon a timely filed petition for reconsideration. As the Supreme Court has held, when an agency's order is reversed by a reviewing court, "[the] agency, like a court, can undo what is wrongfully done by virtue of its order." United Gas Improvements Co. v. Callery Properties, 382 U.S. 223, 229 (1965) (Callery); see, e.g., Iowa Power & Light Co. v. United States, 712 F.2d 1292, 1294-97 (8th Cir. 1983) (holding that the ICC could retroactively impose higher tariff to correct legal error). This narrow exception to the Arizona Grocery principle applies with equal force when a party

[5] BNSF Reply at 12.

first seeks administrative review before seeking judicial review. As the Supreme Court reasoned in Callery, because a court may reverse an agency's decision, parties know that "judicial review at times results in the return of benefits received under the upset administrative order." 282 U.S. at 229. By the same token, the parties are aware that a timely filed request for administrative reconsideration may require the return of benefits received under the upset administrative order. Their expectations are not settled, therefore, until the agency's decision has moved through the entire administrative process and judicial review is complete.[6] Indeed, the justification for the Callery exception is stronger where the agency itself decides, based on a timely filed petition for reconsideration, that it erred in its original decision: a decision is not even "final" for purposes of judicial review until the Board has addressed a timely filed petition for reconsideration.[7] Thus, the Board has the authority to reinstate retroactively the original prescription if the Board should conclude that it erred in West Texas III.[8]

Consequently, consistent with Board practice,[9] if WTU's reconsideration request demonstrates that West Texas III is unlawful, as WTU claims, the Board would not wait for a reviewing court to vacate the decision before acting to "undo what [was] wrongfully done by virtue of [our] order." Callery, 382 U.S. at 229. It would, instead, vacate West Texas III, reinstate the original prescription,

---

[6] See Busboom Grain Co. v. ICC, 830 F.2d 74, 76 (7th Cir. 1987) ("When someone files a petition for judicial review [of an ICC order authorizing an abandonment], the legal effect of the order permitting the abandonment depends on the court's decision, even though it may apply in the interim unless the court issues a stay.").

[7] See ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270 (1988); United Transp. Union v. ICC, 871 F.2d 1114 (D.C. Cir. 1989).

[8] Cf. Dun & Bradstreet Corp. Found. v. United States Postal Serv., 946 F.2d 189, 193-94 (2d Cir. 1991) (holding that when approving a refund request, the agency did not surrender its discretion to review and ultimately reverse its decision granting the refunds); Gun South, Inc. v. Brady, 877 F.2d. 858, 862-63 (11th Cir. 1989) (holding that by granting permits to import firearms, the agency did not surrender its discretion to reconsider that decision, suspend the importation of that type of firearm, and impound subsequently imported rifles that were purchased overseas in reliance on the preexisting permits).

[9] The Board has upon reconsideration changed prescriptions with retroactive effect. See Wisconsin Power & Light Co. v. Union Pacific R.R. Co., STB Docket No. 42051, slip op. at 12-13 (STB served May 14, 2002) (revising with retroactive effect, following a request for reconsideration, maximum rate prescriptions and reparations).

and order BNSF to reimburse WTU for charges that exceeded the original rate prescription. WTU has not therefore demonstrated irreparable harm absent a stay of the Board's decision in West Texas III pending agency reconsideration of that decision since the Board could order that any amounts overpaid by WTU be returned.

Stay Pending Reopening

WTU also seeks a stay pending Board action on a petition to reopen the record for new evidence, but such action would be inappropriate at this time because WTU has not yet filed such a petition to reopen. In West Texas III, the Board advised that "[i]f WTU wishes to have this proceeding reopened based on new evidence or substantially changed circumstances, it may file an appropriate petition to reopen on that basis." West Texas III, slip op. at 4. But the Board found it "unnecessary and inappropriate" to delay, in the meanwhile, the correction of a material error made on the original record, an error WTU has not disputed.[10]

There is a substantive difference between the error of law corrected in West Texas III and the allegedly altered factual circumstances WTU has claimed. The material error corrected in West Texas III was legal in nature – it involved the correct standard for rate relief. WTU asserts that correction of such an error should be equated with revisiting the facts found in West Texas I years later. The Board has consistently held that the remedy for a party that feels that the factual circumstances underlying a maximum rate case have changed substantially is to petition to reopen the proceeding and show the pattern of changes that would lead to a different result.

If WTU files a petition to reopen for new evidence, WTU could then seek the type of interim relief afforded in Arizona PSC. It should be noted, however, that retroactive relief from a rate prescription is not generally available. See West Texas III, slip op. at 6 (rejecting BNSF's request for retroactive application of revised rate prescription); Arizona PSC, slip op. at 8 (rejecting as contrary to Arizona Grocery BNSF's request for retroactive interim relief to shipments that moved before the filing of the petition to reopen). In this case, however, it would be premature to order a stay of the Board's decision in West Texas III, or to grant Arizona PSC styled interim relief, before WTU has filed a petition to reopen setting forth the requisite new evidence or changed circumstances warranting a broader reopening.

---

[10] It is, of course, true that should the Board act favorably on WTU's petition for reconsideration, it may receive the broader reopening it desires. And, in that event, as discussed above, a stay will not have been necessary.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. WTU's request for a stay is denied.

2. This decision is effective on the date of service.

By the Board, Roger Nober, Chairman.

Vernon A. Williams
Secretary